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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

DELORES GLOVER,
Petitioner,

v.

THE HERALD COMPANY d/b/a GLOBE-DEMOCRAT
PUBLISHING COMPANY,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of Missouri

[redacted]

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BRIEF FOR PETITIONER

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Petitioner, Delores Glover, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Missouri entered in this case on April 11, 1977 (Motion for rehearing denied on May 10, 1977). Appendix 3.

(a)

OPINIONS BELOW

The opinion of the Supreme Court of Missouri is reported at 549 SW2 858 and is reproduced in the appendix hereto. Appendix 1.

The opinion of the Missouri Court of Appeals, St. Louis District was entered on August 10, 1976, and is not reported in the official State Reports; it was transferred to the Missouri Supreme Court en banc and heard there as an original appeal. It is reproduced in the appendix hereto. Appendix 2.

(b)

JURISDICTION

The judgment of the Supreme Court of Missouri was entered on April 11, 1977. Petitioner filed a timely motion for rehearing which was denied on May 10, 1977.

This petition was filed within 90 days of May 10, 1977.

This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1257 (3).

(c)

THE QUESTIONS PRESENTED FOR REVIEW

1

In a libel suit brought by a public official, is recovery precluded by New York Times v. Sullivan, 376 U. S. 254, where the person who wrote the libel had actual knowledge of its falsity, but *inadvertantly* wrote the libel?

2

Under New York Times v. Sullivan, is it appropriate or necessary to apply "reckless disregard" criteria where actual knowledge of falsity is proven?

3

Clarification is sought concerning the phrase "persons responsible for the publication" in this court's decision of New York Times v. Sullivan, 376 U.S. 253 l.c. *287*.

Does it mean "responsible" from a causative or administrative standpoint?

(d)

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment I, Constitution of the United States: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for the redress of grievances."

(e)

STATEMENT OF THE CASE

This is a libel action filed by Petitioner, Delores Glover against the Herald Company, d/b/a Globe Democrat Publishing Company (hereafter Globe Democrat).

The facts are not in dispute.

Petitioner Glover was, at the time she filed this case, an alderwoman for the third ward in the City of St. Louis, Missouri. She was forty years of age, married and had no children. She had been an alderwoman for approximately 3½ years and there were 8,000 constituents in her ward.

On Friday, July 6, 1973, there was a meeting of the Board of Aldermen, which petitioner Glover attended. During a de-

bate on a bill which proposed to regulate the equipment required for abortion clinics operating in St. Louis, another alderwoman, Mrs. Lerel Stewart spoke on the issue. The third time she spoke, Mrs. Stewart made the statement that she knew that the particular equipment the bill proposed to require was not necessary because she had personal knowledge, having had two abortions. Mrs. Glover took no part in the debate on the bill

Mrs. Stewart's remark was a shock to the board and embarrassing to Mrs. Glover, who excused herself to regain her composure. After the session ended, Mrs. Glover heard Mrs. Stewart say to Marsha Canfield, Globe Democrat reporter, that she had meant involuntary miscarriages when she had used the term "abortion".

Ms. Canfield telephoned in the news story about the passage of the bill and the debate on it. She gave the rewrite man, Andrew Wilson, information about what happened, correctly attributing the remarks to Mrs. Stewart. This was correctly written into his notes by Mr. Wilson. In rewriting his story for publication, however, he attributed Mrs. Stewart's remarks to Mrs. Glover.

He gave this explanation: "I was working on a deadline, and I had a bundle of names in the story, and we talked about it, and how some of the people voted, and it was just a personal mistake on my part. *I was given the correct information by Marsha.* On my typewritten notes, I had Mrs. Glover's name a couple of lines above Mrs. Stewart's name, and in reading over the notes, I didn't notice Mrs. Stewart's name, and saw Mrs. Glover's name, and I attributed the wrong remark to the wrong person." The following day the story was published by the Globe Democrat as Wilson had written it.

At the trial evidence was adduced to show physical and emotional distress on petitioner's part and a jury returned a

verdict of four thousand dollars actual damages and three thousand dollars punitive damages.

The Missouri Court of Appeals, St. Louis District affirmed (Opinion Appendix 2) and the Missouri Supreme Court reversed (Opinion Appendix 1).

Both appellate courts held that the case was ruled by this court's decision in *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L.Ed.2d 686 (1964). The Court of Appeals held (inter alia) that the reporter's knowledge of the facts satisfied the "malice" requirements of New York Times. The Supreme Court held that it did not.

ARGUMENT

In *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L.Ed.2d 686 (1964), this court established a constitutional standard governing the actions for libel brought by public officials. This standard precluded recovery by a public official unless he proved that the libel was written with actual malice, that is, "with knowledge that it was false, *or* with reckless disregard of whether it was false or not." Supra at 376 U.S. 270. (emphasis added)

To petitioner's knowledge this is the first reported case in which knowledge that the statement was false was possessed by the scrivener of the libel. All other cases have considered circumstances where the writers had no such knowledge.

This court, in what have come to be referred to as "the progeny" of *New York Times v. Sullivan* has clarified the conduct which equates with "reckless disregard." Thus in *Garrison v. Louisiana*, 379 U.S. 64, 85 S. Ct. 209, 13 L.Ed.2d 125, the court said that statements made with "reckless disregard" are those made "with the high degree of awareness of their probable falsity" (376 U.S. at 271-272), and in *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S. Ct. 1323, 1325, 20 L.Ed.2d 262 (1968), this court stated: "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."

In *Curtis v. Butts*, 388 U.S. 130, 158, this court further extended the concept of "reckless disregard" as "an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."

Even though the undisputed evidence in this case showed that the writer of the libel had knowledge of its falsity, the Missouri Supreme Court decided the case as though it were one for the application of "reckless disregard" standards. In referring to *New York Times v. Sullivan* it stated: 549 SW(2) at 861

> "Respondent (petitioner) misapprehends the *quality of knowledge* required by this standard to overcome the constitutional protection," citing *New York Times v. Sullivan* (emphasis added).

Yet in *New York Times*, this court did not define "knowledge" nor did it clarify the concept in its later decisions of *St. Amant v. Thompson* and *Garrison v. Louisiana* (supra) upon which the Missouri Supreme Court based its decision. Rather, in those cases, it was examining the quality of ignorance. It was necessary there to consider closely the conduct of defendants, so as to determine whether, *not* having knowledge, they acted with such "reckless disregard", as to establish actual malice.

Respondent submits that where, as here, knowledge is proven, a further inquiry into the "state of mind" is unnecessary. Publishing with knowledge equates with legal malice, under this court's pronouncement in *New York Times v. Sullivan*.

At the trial of this case, the city editor of the Globe Democrat testified that he had "responsibility" for the publication of the paper, and that he had no knowledge of the falsity of Mr. Wilson's article.

The Missouri Supreme Court stated in its opinion, 509 SW (2) at 861:

> "By the language of New York Times Company (1) actual malice is to be measured at the time of publication: (2) the state of mind necessary to establish actual malice requires that this knowledge 'be brought home to the persons . . . having responsibility for the publication' . . . *New York Times Company* supra at 286-88 . . ."

Inherent in this language of the Missouri Supreme Court, is the interpretation of "responsibility" as used by this court in

New York Times to mean "administrative" rather than "causative" responsibility.

Petitioner requests clarification of the court's meaning in the quoted phrase.

Petitioner further submits that recovery should not have been precluded in the instant case, even under the standard of "reckless disregard".

REASONS FOR GRANTING THE WRIT

This is the first opportunity for this court to clarify and refine the concept of "knowledge" within the New York Times v. Sullivan rule.

Petitioner submits that if the same standards are required to measure "knowledge" as "reckless disregard",—which the Missouri Supreme Court has obviously determined in this case, then the requirement of "knowledge" has been rendered useless. Under the Missouri decision, since all cases involving knowledge must also contain a state of mind that amounts to "reckless disregard" no further reason exists for the "knowledge" standard of actual malice.

Respondent does not believe that this court intended such a result.

Respectfully submitted,

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APPENDIX

APPENDIX 1

Supreme Court of Missouri
en banc

Delores Glover,
Respondent,
vs.
The Herald Company d/b/a Globe-Democrat Publishing Company,
Appellant.
No. 59,804

Appeal From the Circuit Court of the City of St. Louis,
Division 9
Honorable Michael Joseph Hart, Judge

This is a libel action in which respondent Glover was awarded $4,000 actual and $3,000 punitive damages from appellant, The Herald Company, which publishes the St. Louis Globe-Democrat, a general circulation newspaper, which will hereinafter be referred to as the Globe-Democrat. The Globe-Democrat appealed the judgment to the court of appeals, St. Louis district, where Division Four, by a divided court, affirmed the judgment and then sustained appellant's motion to transfer, Rule 83.02. We will determine this case as on original appeal. Mo. Const. Art. V, § 10; Rule 83.09. We reverse.

Mrs. Glover is the duly elected alderwoman representing the third ward of the city of St. Louis. In this capacity she attended a meeting of the Board of Aldermen on July 6, 1973, at which members of the board debated the merits of a bill to regulate the equipment required at clinics performing abortions. Mrs. Glover, although an opponent of abortion, did not speak to the

issue at this meeting. During the course of this debate, alderwoman Lerel Stewart voiced her objection to the proposed ordinance, declaring that on the basis of personal knowledge, having had two abortions, she believed no such equipment was required. Alderwoman Stewart's remarks caused something of a furor. Mrs. Glover, upset by the remarks of alderwoman Stewart's personal experience, left the room momentarily to regain her composure. After the meeting it became clear that alderwoman Stewart had misspoken herself. Mrs. Glover overheard a conversation between alderwoman Stewart and Globe-Democrat reporter Marsha Canfield to the effect that alderwoman Stewart although stating in public debate that she had had two abortions, actually meant to say she had had two involuntary miscarriages. Reporter Canfield then telephoned the Globe-Democrat with her story of the aldermanic debate and the votes cast by the individual members of the Board of Aldermen on the bill. Although Canfield accurately related the course of events and properly attributed alderwoman Stewart's remarks and the later correction to Mrs. Stewart, the Globe-Democrat rewrite man, Andrew Wilson, who received reporter Canfield's telephone call, confused the names of the participants in the news story and incorrectly attributed alderwoman Stewart's remarks to Mrs. Glover. Wilson testified:

> "I was working on a deadline, and I had a bundle of names in the story, and we talked about it, and how some of the people voted, and it was just a personal mistake on my part. I was given the correct information by Marsha. On my typewritten notes, I had Mrs. Glover's name a couple of lines above Mrs. Stewart's name, and in reading over the notes, I didn't notice Mrs. Stewart's name and saw Mrs. Glover's name, and I attributed the wrong remark to the wrong person."

The city editor of the Globe-Democrat, who had no reason to question the accuracy of the report as rewritten by Wilson,

passed the story for publication after having read it. The story appeared in the next day's edition on Saturday as written by rewrite man Wilson and attributed the remarks of alderwoman Stewart concerning abortion to Mrs. Glover. Upon reading the article, Mrs. Glover became upset to such a degree that she required sedation. A retraction was immediately demanded of the Globe-Democrat, which responded by publishing a retraction in its editions on its next publishing day, Monday. Mrs. Glover testified that as a further consequence of the Globe-Democrat story, she received numerous anonymous obscene telephone calls for a period of two weeks following publication of the story and two letters detailing the horrors of abortion.

We hold that notwithstanding the obvious and regrettable upset suffered by Mrs. Glover, as a public official she has failed as a matter of law to demonstrate that the Globe-Democrat published its story with the actual malice required to overcome the qualified constitutional privilege recognized in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and therefore, the judgment and verdict in the circuit court are reversed.

The modern source for the law of defamation of public officials is *New York Times Co. v. Sullivan*. The alleged libel in that case was contained in an advertisement placed in the New York Times to solicit funds to defend the Rev. Martin Luther King, Jr., against charges of perjury. The advertisement incorrectly portrayed the reaction of Montgomery, Alabama, police to a demonstration held at an Alabama state college campus. The New York Times made no effort to substantiate the accuracy of the advertisement although the correct information was available from the Times' news files. The Montgomery City commissioner with authority over the police sued to redress this alleged libel.

The Supreme Court recognized the sensitive nature of the question presented and the inevitable stress generated by a con-

test between the law of libel and the First Amendment's explicitly guaranteed protection of free speech. Moreover, the court recognized the crucial role the press plays when reporting the affairs of government and public officials by deciding the *New York Times* case

> "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."

New York Times Co. v. Sullivan, supra at 270.

To this end, the Supreme Court articulated a constitutional standard prohibiting a public official from recovering for

> "a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

Id. at 279-80.[1]

Respondent misapprehends the "quality" of knowledge required by this standard to overcome the constitutional protection. As a public official, which there can be no doubt she was, respondent's case is bottomed upon the presumption that Wilson knew that the story as published was false because he had originally received the correct information from reporter Canfield, and therefore, respondent maintains she has satisfied the New York Times standard by establishing actual malice. Although the error in respondent's interpretation of actual malice is demonstrable by reference to *New York Times Co. v.*

[1] It has come to be recognized that a public official must establish this proof with convincing clarity. Monitor Patriot Co. v. Roy, 401 U.S. 265, 275-76 (1971); New York Times Co. v. Sullivan, 376 U.S. 254, 285-86 (1964).

Sullivan alone, this conclusion is further compelled by more recent United States Supreme Court cases that refine the standard articulated in *New York Times Co.*

By the language of *New York Times Co.*, (1) actual malice to be measured at the time of publication, (2) the state of mind necessary to establish actual malice requires that this knowledge "be brought home to the persons . . . having responsibility for the publication", and (3) negligence is "constitutionally insufficient to show the recklessness that is required for a finding of actual malice." *New York Times Co.*, supra at 286-88.

In *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964), the Supreme Court explained that the qualified privilege articulated in *New York Times Co.* could grant a public official a

> "civil remedy only if he establishes that the utterance was false and that it was made with knowledge of its falsity or in reckless disregard of whether it was false or true. . . . And since '. . . erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the "breathing space" that they "need . . . to survive" . . .' 376 US. at 271-272, only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions. For speech concerning public affairs is more than self-expression; it is the essence of self-government.
>
> ". . .
>
> "Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. . . . Hence the knowingly false statement and

> the false statement made with reckless disregard of the truth, do not enjoy constitutional protection."

The Supreme Court took the further opportunity to disavow any desire to base *New York Times Co.* upon a negligence standard, id. at 79. Thus it becomes increasingly clear that Wilson did not have the requisite intent. Although initially he was presented the facts, Andrew Wilson was unaware of the falsity of the story. The most that can be said is that he was negligent, regrettably, in preparing the story of the aldermanic debates. There is no evidence of a high degree of awareness on his part of probable falsity in what he wrote. Consequently, here as in *New York Times*, the evidence against the Globe-Democrat "supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice." 376 U.S. at 288.

In *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 84 (1967), the court reaffirmed the *New York Times Co.* standard requiring a "high degree of awareness of . . . probable falsity." In *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), the court stated that "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." In 1971, three cases reiterated the *New York Times Co.* standard requiring clear and convincing proof, *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 275-76, of publication of knowing falsehood, *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 300, not just negligent error of fact, *Time, Inc. v. Pape*, 401 U.S. 279, 291.

The Ocala case is of particular interest. In that case, a newspaper published a story that the mayor, who was running for a different elective office, had been charged with perjury.

Actually, the story was false about the mayor but substantially correct about his brother. Apparently the reporter telephoning the story into the area editor had correctly identified the brother, but the editor, never having heard of the brother, inadvertently substituted the name of the mayor. The Supreme Court reversed the judgment which had been awarded to the mayor, because recovery had been allowed without a finding that the article was published with reckless disregard of its truth or falsity. *Ocala Star-Banner Co. v. Damron*, supra at 300.

Last, in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334-35 n. 6 (1974), the Supreme Court once again embraced *New York Times Co.* and *St. Amant v. Thompson*, among others.

> "In *New York Times* the Court held that under the circumstances the newspaper's failure to check the accuracy of the advertisement against news stories in its own files did not establish reckless disregard for the truth. . . . In *St. Amant v. Thompson* . . . the Court equated reckless disregard of the truth with subjective awareness of probable falsity: 'There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.' "

In view of the foregoing cases, there can be no doubt that appellant did not possess the requisite state of mind at the time of publication so as to enable respondent to overcome the constitutional limitations. The judgment is reversed.

/s/ ROBERT E. SEILER
Chief Justice

Morgan, Bardgett, Henley, Finch, Donnelly, JJ., and Shangler, Sp.J., concur; Rendlen, J., not sitting.

APPENDIX 2

In the Missouri Court of Appeals
St. Louis District
Division Four

Delores Glover,
Respondent,
v.
The Herald Company d/b/a Globe-Democrat Publishing Company,
Appellant.

No. 37372
Appeal from the Circuit Court of the City of St. Louis

Hon. Michael Joseph Hart, Judge

Opinion Filed: August 10, 1976

A trial jury awarded Delores Glover $4,000 actual and $3,000 punitive damages in her libel suit against The Herald Company d/b/a Globe-Democrat Publishing Company. The defendant has appealed from the judgment entered on the verdict.

Delores Glover is a 40-year-old married woman who has been a member of the Board of Aldermen of the City of St. Louis for 3½ years. There are 8,000 constituents in her ward. She is a Baptist and a Sunday School teacher. Mrs. Glover attended a meeting of the board of aldermen at which a bill to regulate the equipment required for abortion clinics operating in the city was being debated. She did not "participate in the debate or make any statements from the floor." Another female member of the board of aldermen, Mrs. Lerel Stewart, spoke to the issue three times. Speaking for the third time,

Mrs. Stewart stated she knew the equipment the bill required was not necessary, because she had personal knowledge, having had two abortions. This statement stirred and shocked the board and made Mrs. Glover nervous; all but four of the members of the board were men. Mrs. Glover left the room and went to the ladies' restroom to recover her composure. Later she returned and action on the bill continued for another 45 minutes or an hour, at the conclusion of which the bill passed by a vote of 19-7. After the meeting Mrs. Glover overheard Mrs. Stewart, who was talking to a newspaper reporter named Bill Wilkerson, explain and correct her statement, saying she did not mean to say she had two abortions; that she had not gone to a doctor's office; that she meant she had two involuntary *miscarriages*. Mrs. Stewart made the same statement to Marsha Canfield, a Globe-Democrat reporter. While passing, Mrs. Glover heard Mrs. Stewart say to Miss Canfield: "I will give you an answer if you will print it correctly. I did not mean abortion, I meant two involuntary miscarriages." Reporter Canfield telephoned the story to Andrew Wilson, rewrite man for Globe-Democrat, telling him what was involved, summarizing the debate on the bill, who voted for and against, etc. from her notes. Mr. Wilson testified: "I was working on a deadline, and I had a bundle of names in the story, and we talked about it, and how some of the people voted, and it was just a personal mistake on my part. I was given the correct information by Marsha. On my typewritten notes, I had Mrs. Glover's name a couple of lines above Mrs. Stewart's name, and in reading over the notes, I didn't notice Mrs. Stewart's name and saw Mrs. Glover's name, and I attributed the wrong remark to the wrong person." Both Marsha Canfield, in calling in the story, and Andrew Wilson, in writing it, were acting in the regular course of their employment with the defendant. In his deposition Wilson answered "I don't think so" to the question, "After [Miss Canfield] had given you this report, did you read it back to her on the phone? Did you check it back with her at all?"

The story was published next day on the first page of the Globe-Democrat under the headline "TOUGH ABORTION CLINIC CONTROL PASSED," in the first edition, circulation 25,000. The following appeared on the first page: "Mrs. Glover caused a stir in the public debate when she said she had had two abortions and that some of the equipment that would be required under the new bills seems unnecessary to her. She later told a reporter she meant miscarriages not abortions." The matter quoted appeared in the continuation of the story on page 10 in the later home delivery edition (circulation 205,-000). In that edition the front page headline stated "ABORTION BILL PASSES, FACES COURT TEST."

Mrs. Glover read the story in the first edition. Shocked and thrown into a nervous state, she had to get sedation from her doctor. She called her lawyer, who sent a telegram demanding a retraction. In a very depressed state and withdrawn, Mrs. Glover did not attend First Baptist Church Sunday School the next day, where she was a teacher, and cancelled all meetings for the rest of the week. Mrs. Glover is opposed to abortion on religious grounds. She has never had a child and has never been pregnant.

On the next publication day the Globe-Democrat published a retraction on page 3A as follows:

> "LEREL STEWART TOLD BOARD OF MISCARRIAGES
>
> "The alderwoman who, during debate on controls for St. Louis abortion clinics, said she had two abortions was incorrectly identified as Alderwoman Delores Glover in The Weekend Globe-Democrat.
>
> "In opposing the bill establishing strict equipment requirements on abortion clinics, it was Alderwoman Lerel Stewart (Dem.), 22nd Ward, and not Mrs. Glover (Dem.), 3rd Ward, who made the statement. Mrs. Stewart later said she meant two miscarriages, not abortions.
>
> "The Globe-Democrat regrets the error. * * *"

On the first day the story was published Mrs. Glover started receiving anonymous telephone calls, which continued all night long over a period of two weeks. Calls came at 2, 3 or 4 o'clock in the morning. She received 100 or more calls before the retraction was published, and 100 or more calls afterwards. The majority of the calls were from men. They were obscene, suggesting sexual relationships with the callers; "all different kinds of horrible things that you can imagine." She received two letters illustrating the horrors of abortion, one containing the notation, "Please, Mrs. Glover, help."

The city editor of Globe-Democrat, the supervisor who passed the story for publication, testified that he read the story and the quotes and had no reason to question it; that there would be no way for him to ever know whether a proper person has been quoted or not in such a story as this, unless somebody told him about it. Defendant's net worth as of December 31, 1973 was in excess of $1,000,000.

Appellant's first point: "The Court erred in failing to sustain defendant's motion for a directed verdict, and for judgment N.O.V. because plaintiff was a public officer, and the subject of the publication was an official debate of a legislative body, and, under the free press clauses of Amendment I, Constitution U.S. and of the Missouri Constitution, Article I, Section 8, no recovery for libel can be had in the absence of proof of knowing falsehood, or reckless disregard of whether the publication was true, and there was no such evidence."

Appellant asserts that since plaintiff was a public official her claim falls directly under the rule of New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964), that

> "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

We have concluded that the evidence adduced at the trial constituted sufficient proof that the publication was made both with knowledge that it was false *and* with reckless disregard of whether it was false or not to warrant the jury in returning a verdict for plaintiff.

Appellant argues that while reporter Canfield had knowledge of the truth the rule does not require knowledge of the truth of what happened but knowledge of *the falsity of the publication*, and that Canfield "had no knowledge of what the publication would contain until she had read the article in the published newspaper." Both Canfield, the reporter, and Wilson, the rewrite man, knew that Mrs. Stewart (and not Mrs. Glover) made the statement that she had two abortions. Both Canfield and Wilson were acting in the regular course of their employment with appellant. Their knowledge was appellant's knowledge under familiar principles of respondent superior, and for liability to attach upon publication of the known falsehood it was not a prerequisite that Canfield first read what was published. It is enough that with personal knowledge of the true facts (gleaned by Canfield at the meeting of the board of aldermen, which she attended and observed) Canfield transmitted the true facts to appellant's employee Wilson for the purpose of incorporating them in an article for publication, and that the latter, with full knowledge of the truth of the matter, wrote and placed in line for publication an article containing a base falsehood. The jury could find that Wilson knew that if he switched the names of Mrs. Stewart and Mrs. Glover the publication would be false and a grievous defamation of an innocent person would result.

Appellant further argues that the city editor, Ray J. Noonan, did not know that the story was false; that Noonan was the person in appellant's organization responsible for the publication; that under New York Times v. Sullivan knowledge must be brought home to the persons in the newspaper's organization "having responsibility for the publication," and therefore the publisher cannot be held liable. A reading of the opinion in that case, and the opinions in Whitmore v. Kansas City Star Co., 499 S.W. 2d 45, 50, 52 (Mo. App. 1973); Woolbright v. Sun Communications, Inc., 480 S.W. 2d 864, 868 (Mo. 1972); Time, Inc. v. McLaney, 406 F. 2d 565, 573 (5th Cir. 1969); Walker v. Pulitzer Pub. Co., 394 F. 2d 800 (8th Cir. 1968); Mahnke v. Northwest Publications, Inc., 280 Minn. 328, 160 N.W. 2d 1 (1968), clearly show that the persons responsible for the publication include not merely the city editor, who is possessed of a final veto, but also various other persons in the organization responsible for moving libelous matter along the route toward the consummation of publication, such as the advertising acceptability department in the Sullivan case, and reporters, scriveners and writers in the others. We believe the Supreme Court in New York Times v. Sullivan was referring to causative and not to final administrative responsibility. As respondent aptly observes, appellant's interpretation could lead to abuse. Under it columnists, reporters and persons writing for publication could write libelous articles relating to public officials with full knowledge of their falsity and yet the publishers would escape liability by simply showing that the editors had not been informed of the true facts. Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971), cited by appellant, does not compel a different result. Although Ocala is a case of incorrect attribution the opinion contributes nothing on any issue before us. Ocala was submitted on the theory that the rule of New York Times v. Sullivan was inapplicable. Neither the question of the sufficiency of the evidence to show actual malice by knowledge nor the question of who was responsible for pub-

lication or the extent of that person's knowledge, was adjudicated in Ocala.

Appellant correctly suggests that New York Times v. Sullivan refers to the "state of mind required for actual malice," but we find therein no further definition of the required state of mind than "knowledge that [the statement] was false" or "reckless disregard of whether it was false or not." In Warren v. Pulitzer Pub. Co., 336 Mo. 184, 78 S.W. 2d 404, 418 (1934), the Supreme Court of Missouri defined "express" (the same as "actual") malice in substantially the same way, viz: "What plaintiff had to show to prove express malice was that the publication, in so far as it was privileged, was not made in good faith to give a fair and impartial account of the charges, trial, and result which were matters of public concern and about which it was privileged to inform the public, but that it was done with a wrong motive. That is what malice is; the presence of an improper motive. McClung v. Pulitzer Pub. Co., 279 Mo. 370, 214 S.W. 193; Newell, § 273. *'Proof of the falsity of the facts and knowledge of such falsity is proof of actual malice'* (Cook v. Pulitzer Pub. Co., 241 Mo. 326, loc. cit. 362, 145 S.W. 480, 492), *because that does, unquestionably, show a wrong motive.* Therefore, if defendant has added material facts on its own authority, which it knew to be false, it would thereby go outside of its privilege and malice would be inferred. *It is likewise a wrong motive, which would tend to show malice, to state something as the truth* without knowing whether it is true, *recklessly, and* without any reasonable attempt to find out about it or *with complete disregard of other known facts.* 37 C.J. 78, § 483, p. 84, § 499; Newell, § 277." (Our emphasis.)

Appellant argues that there was no evidence of the state of mind on the part of anyone associated with appellant, but the record is to the contrary. Appellant's reporter Canfield and rewrite man Wilson disclosed their state of mind in their testi-

mony, which conclusively shows that each knew the facts; knew exactly what happened at the board meeting; knew that Mrs. Glover did not make the self-accusatory statements attributed to her; knew that another member of the board (Mrs. Stewart) was the one who made the statements. From this knowledge it necessarily follows that Canfield and Wilson knew that if appellant published a report that Mrs. Glover admitted having two abortions it would be a complete falsehood. Proof of the falsity of the facts published and knowledge of such falsity shows a wrong motive, and makes a case of actual malice.

Not only on the basis of knowledge of falsity but also on the basis of recklessness there was sufficient evidence for the jury to find actual malice. Canfield reported the true facts from her own personal knowledge (not from a report by others). Wilson was given the correct information. He made notes; took down the names of the members of the board of aldermen on his typewriter. He wrote Mrs. Glover's name above Mrs. Stewart's name. He was "working on a deadline." In reading over his notes he says he did not notice Mrs. Stewart's name. Seeing Mrs. Glover's name he wrongfully attributed Mrs. Stewart's remarks to Mrs. Glover. Wilson seeks to justify the switch on the basis of mistake but the jury did not have to accept his testimony that the error was the result of mere mistake. The jury could find that Wilson hurriedly (in order to meet a deadline), recklessly, and without regard for the truth and in complete disregard of other known facts of which he was possessed, and in wanton disregard of the rights and interests of an innocent person, caused to be published a calumny—a defamation he knew was not true, without rereading his notes or checking with reporter Canfield. Curtis v. Butts, 388 U.S. 130, 158 (1967), defines reckless disregard as "an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." Under this evidence, coming from the mouths of appellant's own employees, the jury could find such an extreme departure. St. Amant v. Thompson,

390 U.S. 272, 731 (1968), makes the test whether the publisher "entertained serious doubts as to the truth of his publication." This test was recognized by the Missouri Court of Appeals in Whitmore v. Kansas City Star Co., supra, 499 S.W. 2d l.c. 49. Here the publisher's representatives had much more than serious doubts about the truth of the publication; they "knew for a fact" that the publication was untrue. Garrison v. Louisiana, 379 U.S. 64 (1964), suggests the standard is whether the publisher had a "high degree of awareness of [the publication's] falsity." Wilson clearly had more than a degree of such awareness; with Canfield's oral communication in his mind and the written data before him Wilson KNEW FOR SURE that what he was writing was false. Accordingly, there was evidence from which the jury could find that the publication was the result of reckless research and rewriting techniques. See Durso v. Lyle Stuart, Inc., 33 Ill. App. 3d 300, 337 N.E. 2d 443, 447 [7] (1975).

Whether there was actual malice as required by New York Times v. Sullivan is a question of fact for the jury. St. Amant v. Thompson, supra. As respondent points out, abortion is an explosive issue, considered by many to constitute the deliberate taking of human life—murder; a violation of God's commandment and of the constitutional right to life—and "[i]n the highly charged, emotional atmosphere generated by the repeal of anti-abortion statutes, surely it was for the jury to decide whether or not appellant acted 'with reckless disregard for the truth' in publishing this article falsely accusing the respondent of being a self-confessed abortionist."

Appellant denies there was any defamation, urging that the publication carries the antidote with the poison because read as a whole it shows that declarant meant miscarriages, not abortions. The more than two hundred people who telephoned to Mrs. Glover following the publication evidently did not consider that declarant meant miscarriages when she said abor-

tions, and declarant's postscript about miscarriages is reasonably susceptible to the interpretation by the average reader as a cover-up, especially since it is well known that the instruments used in procuring abortions are not used in case of a miscarriage, which is a premature, unplanned expulsion of a fetus.

Appellant questions whether a statement that Mrs. Glover had experienced two abortions, without some indication of the circumstances, is defamatory; and asserts that at time of publication the Missouri abortion statutes had been stricken down as unconstitutional, under Roe v. Wade, 410 U.S. 113 (1973), and therefore the published words did not charge the commission of a crime; that declarant could have been referring to therapeutic abortions, which never were a crime; that there was no suggestion in the publication that the abortions were not within the exception of the pre-1973 abortion statutes, or were outside the constitutionally protected abortions specified in Roe v. Wade. Appellant further claims that the published words do not fall within the statutory definition of libel in § 559.410, RSMo 1969, which provides that a libel is the malicious defamation of a person made public by any printing, etc., tending to provoke [her] to wrath or expose [her] to public hatred, contempt or ridicule, or to deprive [her] of the benefits of public confidence and social intercourse. As to the latter, the evidence warranted the jury in finding that the published statement tended to expose Mrs. Glover to hatred, contempt and ridicule and damaged her reputation. Attributing such a statement to a lady of previous good reputation; a public official of importance in the city government; a member and teacher in a church one of the tenets of which is opposition to abortion, cannot be successfully defended on that ground.

Appellant's attempt to justify the publication by drawing distinctions between various types and kinds of abortions is difficult to follow. In the public mind an abortion is a planned

and calculated interruption of pregnancy, and in the minds of many an abortionist is infamous.

Although the Missouri statutes on abortion have been abrogated it is not necessary in order to constitute libel per se that one be charged with the commission of a crime; it is enough that the publication provoked plaintiff to wrath, or exposed her to public hatred, contempt or ridicule, or deprived her of public confidence and society, within the ambit of § 559.410, and of this there was substantial evidence.

Appellant's final point questions the propriety of Instruction 5, which follows: "If you find the issues in favor of the plaintiff and if you believe the conduct of defendant, as submitted in Instruction 2, was willful, wanton and malicious, then in addition to any damages to which you find plaintiff entitled under Instruction 4, you may award plaintiff an additional amount as punitive damages in such sum as you believe will serve to punish defendant and to deter it and others from like conduct."

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), places strict limitations on the power of the states to allow recovery of punitive damages in defamation suits, but apparently the states are constitutionally permitted under that decision to award punitive damages to a plaintiff who proves that a publisher has engaged in knowing or reckless defamation under the New York Times v. Sullivan standard.

Appellant contends that under Gertz punitive damages may not be awarded in this libel suit because there was no evidence upon which to find that appellant's conduct was willful, wanton, or malicious, and that Instruction 5 permits the jury to award punitive damages without a finding of malice because it submits willful, wanton or malicious conduct in the alternative, coupled with the disjunctive "or," and is antithetical to the requirement of a finding of malice under main verdict-directing Instruction

2. As above developed, there was sufficient evidence for the jury to find "malice" as defined in New York Times v. Sullivan. In order to return a verdict for plaintiff the jury was required, under Instruction 2, to find actual malice. Having returned a verdict for plaintiff on that basis, there was no necessity of resubmitting the question of malicious conduct in Instruction 5, and the authorization of an award of punitive damages, alternatively, on the basis of willful or wanton conduct, was surplusage (but faultless, since the requisite finding of malice was submitted and made under Instruction 2). Therefore, although Instruction 5 needlessly included the language "willful, wanton, or," the defect constituted harmless error.

Judgment affirmed.

/s/ NORWIN D. HOUSER
Special Judge

GERALD M. SMITH
Chief Judge
Dissents in Separate
Dissenting Opinion

ALDEN A. STOCKARD
Special Judge
Concurs

In the Missouri Court of Appeals
St. Louis District
Division Four

Delores Glover, Respondent, vs. The Herald Company d/b/a Globe-Democrat Publishing Company, Appellant.	No. 37,372. Appeal from the Circuit Court of the City of St. Louis. Hon. Michael Joseph Hart, Judge.

Opinion Filed: August 10, 1976

Dissenting Opinion

I must respectfully dissent. I am in no disagreement that plaintiff was defamed and sustained substantial injury as a result thereof. I am unable, however, to find that the defamatory falsehood was made with the actual malice required under New York Times Co. v. Sullivan, 376 U.S. 254 (1964). I have personal reservations that a doctrine which exempts a profit-making enterprise from liability for its damage to personal reputation through falsehood, negligent or otherwise, is necessary to protect a responsible free press. But that doctrine is firmly established by New York Times Co. v. Sullivan, *supra*, and its progeny, and I am bound by those decisions.

It is clear that plaintiff is a public official. She is a member of the Board of Aldermen of the City of St. Louis, an elective position. It is also clear that the defamatory news story dealt with her official conduct. If true, it concerned her participation in a debate in a legislative body relating to a matter of great public concern. That the statement was in fact false does not mean that it does not relate to official conduct. Ocala Star-

Banner Co. v. Damron, 401 U.S. 295 (1971). Therefore, the case here is squarely controlled by New York Times v. Sullivan.

While the cases coming after *New York Times* have refined and honed the doctrine there announced, they have not changed the basic rule therein stated as it relates to public officials. The major areas of refinement which have occurred relate to whether and to what degree the doctrine applies to "public figures" or private citizens in whom the public has an interest. The series of cases following *New York Times* make it abundantly clear that as to public officials negligence by the offending media does not establish the necessary "actual malice" Garrison v. Louisiana, 379 U.S. 64 (1964); Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); St. Amant v. Thompson, 390 U.S. 727 (1968); Time, Inc. v. Pape, 401 U.S. 279 (1971); Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). Despite the ingenious argument of the majority opinion, I can find nothing but negligence and carelessness here.

"Actual malice" under *New York Times* requires that the statement be made with knowledge that it was false or with reckless disregard of whether or not it was false. Mr. Noonan had no knowledge that the statement was false. Reporter Canfield knew what the true facts were, but could not have known of the falsity of the statement published because she did not know what statement was published until she read it in the newspaper. Mr. Wilson had the correct facts in his notes. He had, therefore, the means to know the truth. But through careless mistake he erroneously copied the material from his notes to the article as published. I cannot conceive that such a mistake can be equated into a finding that he knew of the falsity of the statement published. The majority would allow the jury to disregard Wilson's testimony that what he did was make a mistake. But there is no evidence that he or anyone else knew of the error in the article. To disregard Wilson's testimony of mistake does not thereby create affirmative evidence that what he did was in-

tentional or that he knew the article was false. Had the same mistake been made by a typesetter or a layout man I would see no difference. Negligence—yes, intentional falsehood—no.

Nor can I conclude, as does the majority, that a mistake made under the pressure of a deadline constitutes a reckless disregard of the truth of the statement. To equate the situation here with the extreme fact situation of Curtis v. Butts, 389 U.S. 130 (1967), rather than the more comparable situations of New York Times Co. v. Sullivan, *supra*, or Associated Press v. Walker, 388 U.S. 130 (1967), is unwarranted. And see St. Amant v. Thompson, 390 U.S. 727 (1968), holding far more reckless conduct as insufficient to show reckless disregard. As stated in Garrison v. Louisiana, 379 U.S. 64 (1964), "only those false statements made with the high degree of awareness of their probable falsity demanded by New York Times may be the subject of either civil or criminal sanctions." l.c. 74. I find no high degree of wareness in Wilson of probable falsity. The only evidence in this regard is from Wilson. He testified he was working on a deadline; had a "bundle of names in the story"; in reading over his notes he did not notice Mrs. Stewart's name and saw Mrs. Glover's name and "I attributed the wrong remark to the wrong person." He further testified that "if anything is in doubt in my mind about information or going over a story I'm not clear about something, I would double check it" and that he did not consider that necessary here. I do not find this evidence sufficient to meet the burden of *New York Times* and succeeding cases.

Confronted with the decision of New York Times v. Sullivan, *supra*, and the numerous reaffirmances of that case, I must conclude that plaintiff cannot recover for the negligent conduct of defendant. I would reverse.

/s/ Gerald M. Smith
Chief Judge

APPENDIX 3

Clerk of the Supreme Court
State of Missouri
Jefferson, City, Missouri
65101

May 10, 1977

Thomas F. Simon
Clerk

Telephone
(314) 751-4144

Mail
P. O. Box 150

Mr. George D. Chopin
705 Olive Street
Suite 1415
St. Louis, Missouri 63101

In re: Delores Glover vs. The Herald Company d/b/a Globe-Democrat Publishing Company, No. 59804

Dear Mr. Chopin:

This is to advise that the Court this day has made the following order in the above-entitled cause:

"Respondent's motion for rehearing overruled."

Yours very truly,

/s/ THOMAS F. SIMON
Clerk

/bh

cc: Lon Hocker, 130 S. Bemiston, Clayton, Mo. 63105